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9-28-06

ORDINANCE NO.

AN ORDINANCE GRANTING A FRANCHISE TO TEXAS GAS SERVICE, A DIVISION OF ONEOK, INC., RELATING TO THE DISTRIBUTION AND SALE OF GAS IN THE CITY THROUGH THE USE OF PUBLIC STREETS, EASEMENTS, AND RIGHTS-OF-WAY; AND REPEALING ORDINANCE NO. 86-0918-T.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The council grants a franchise to Texas Gas Service Company, a division of ONEOK, Inc., and its legal representatives, successors, lessees and assigns, under the following terms and conditions:

SECTION 1. Definitions.

1.1. For the purpose of this Ordinance the following terms, phrases, words and their derivatives shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, words in the singular number include the plural number, and the use of any gender shall be applicable to all genders whenever the sense requires. The words "shall" and "will" are mandatory and the word "may" is permissive. Words not defined shall be given their common and ordinary meaning.

1.2. "City" shall mean the City of Austin, Texas, a municipal corporation in the State of Texas.

1.3. "City Manager" shall mean the City Manager of the City, or his or her authorized designate.

1.4. "City Parks" shall mean and include all areas dedicated or used as a public park, recreation area, scientific area, wildlife refuge or historic site.

1.5. "Company" shall mean Texas Gas Service Company, a division of ONEOK, Inc., a corporation organized and existing under and by virtue of the laws of the State of Oklahoma, authorized to transact and actually transacting business in the State of Texas, its legal representatives, successors, lessees and assigns.

1.6. "Consumer" shall mean any person or organization within the corporate limits of the City of Austin receiving and using gas from the Company for his or her own

1 appliances or equipment, whether or not the gas is billed directly to him or her, or to a
2 second party. (For example, in the case of a rental unit where the utilities are part of the
3 rent, the landlord is a Customer and the tenant is a Consumer.)
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5 1.7. "Corporate limits" shall mean all areas lying within the City limits and full
6 purpose annexed adjacent areas, as they may change from time to time.
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8 1.8. "Council" shall mean the governing body of the City of Austin.
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10 1.9. "Customer" shall mean any person or organization being billed for gas service
11 whether used by him or her, or by others.
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13 1.10. "Director of Public Works" shall mean the Director of the Public Works
14 Department of the City, or successor in function.
15

16 1.11. "Distribution System," or "Austin Distribution System" shall mean, in its
17 entirety, all pipes, equipment and other appurtenances and any portion thereof, used or
18 necessary for the transporting and delivery of gas to customers and consumers within the
19 corporate limits of the City.
20

21 1.12. "Emergency" is defined as sudden and unforeseeable damage or malfunction
22 of a portion of the Company's Austin Distribution System that creates a threat to life,
23 health or property.
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25 1.13. "End user" is defined as an individual or business, other than a business that
26 generates electricity for resale to wholesale or retail customers, that consumes natural gas
27 during the pursuit of its private or commercial purposes.
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29 1.14. "Franchise" shall mean this Ordinance, and all rights and obligations
30 established herein.
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32 1.15. "Gas" shall mean natural gas and any synthetic gas distributed by the
33 Company through its Distribution System.
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35 1.16. "Gross Revenues" shall mean all revenue derived or received, directly or
36 indirectly, from the sale of gas to all classes of customers and consumers (excluding gas
37 sold to another gas utility in the City for resale to its customers within the City) within
38 the corporate limits of the City.
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1 (1) "Gross Revenues" shall include:

- 2 (a) revenues derived from the following 'miscellaneous charges';
- 3 (i) charges to connect, disconnect, or reconnect gas within the
- 4 City;
- 5 (ii) charges to handle returned checks from consumers within the
- 6 City;
- 7 (iii) such other service charges and charges as may, from time to
- 8 time, be authorized in the rates and charges on file with the
- 9 City;
- 10 (b) receipts from any non-utility or non-regulated services or products;
- 11 (c) gross receipts from gas sales and gross receipts from gas
- 12 transportation;
- 13 (d) all revenues derived by the Company from the transportation of
- 14 Transport Gas through the Company's Distribution System within
- 15 the City to end users located within the City (excluding any gas
- 16 transported to another gas utility in the City for resale to its
- 17 customers within City);
- 18 (e) the value of gas transported by the Company for Transport
- 19 Customers that are not public entities as defined herein, through the
- 20 System of the Company located in the City's Public Rights-of-Way
- 21 ("Third Party Sales") (excluding the value of any gas transported to
- 22 another gas utility in the City for resale to its customers within the
- 23 City), with the value of such gas to be established by utilizing either
- 24 the purchase price of the Transport gas as reported to the Company
- 25 by its Transport customers or 110% of the Houston Ship Channel
- 26 Index of prices for large packages of gas published each month in
- 27 Inside FERC's Gas Market (or a successor publication or another
- 28 publication agreed upon by the City and Company) as reasonably
- 29 near the time that the transportation service is performed; and
- 30 (f) receipts from sales of materials, appliances or equipment.

31 (2) "Gross revenues" shall not include:

- 1 (a) the revenue of any person including, without limitation, an
2 Affiliate, to the extent that such revenue is also included in Gross
3 Revenues of the Company;
- 4 (b) sales taxes;
- 5 (c) any interest income earned by the Company;
- 6 (d) all monies received from the lease or sale of real or personal
7 property, provided, however, that this exclusion does not apply to
8 the lease of facilities within the City's public rights-of-way;
- 9 (e) receipts for maintenance of appliances, machinery or equipment;
- 10 (f) receipts for compensation for damage to the Company's property;
- 11 (g) receipts for the generation of electricity;
- 12 (h) contributions in aid of construction; and
- 13 (i) revenues billed but not ultimately collected or received by the
14 Company.

15 1.17. "Public Easement" shall mean those public easements held, owned or
16 controlled by the City, the terms, conditions or limitations upon which are not
17 inconsistent with the construction or maintenance of a natural gas distribution system.
18

19 1.18. "Public Entity" shall mean any political subdivision of the State of Texas,
20 any Federal, State, or County, government office or agency, any state supported college
21 or university, or any hospital that provides indigent health care under a contract with a
22 political subdivision of the State.
23

24 1.19. "Service Line" shall mean lines connected at or nearly at right angles to the
25 Company's mains and used to convey gas therefrom to the property line of customers
26 and/or consumers.
27

28 1.20. "Sidewalk" is that portion of a street which is not improved and maintained
29 for vehicular travel.
30

31 1.21. "Street" or "Alley" shall mean a publicly dedicated or maintained right-of-
32 way, a portion of which is open to use by the public for vehicular travel.
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34 1.22. "Transport gas" or "transported gas" shall mean gas owned or controlled by a
35 user or its designee (i.e., gas that is purchased or otherwise acquired by an end user from

1 someone other than the Company) and delivered by such user or its designee to the
2 Company at a point on the Company's Distribution System, such point of delivery to be
3 defined by the Company, and carried, delivered or transported through the Company's
4 system at a point of redelivery in the City by the Company to the user, for a fee. The
5 terms and conditions of the transportation arrangement, including but not limited to the
6 delivery point(s) of redelivery, measurement and location of title transfer, shall be as set
7 forth in the contract entered into between the Company and the end user and/or the
8 Company's transportation tariffs on file with the Railroad Commission of Texas or other
9 appropriate regulatory authority.

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11 1.23. "Unmetered Gas" shall mean that gas being moved under pressure from the
12 Company's main lines to the customers' and/or consumers' meter.

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14 **SECTION 2.** **Granting of Franchise.**

15
16 2.1. There is hereby granted to the Company a non-exclusive Franchise to
17 maintain, construct, equip, extend, alter and otherwise establish and operate in the City,
18 as now or hereafter constituted, works, systems, plants, lines and all related facilities
19 (including those now in service) necessary or appropriate to sell, manufacture and store,
20 distribute, transport, convey or otherwise conduct, serve, supply and furnish the
21 inhabitants of the City and others, and to the City, whenever the City may desire to
22 contract therefore, gas for light, fuel, power, heat and any and all other useful purposes,
23 and the said Company is hereby granted passage, right-of-way in, under, along and
24 across, the right to occupy and use in any and all lawful way during the life of this
25 Franchise any and all streets, avenues, public easements, rights-of-way, alleys, highways,
26 sidewalks and bridges, of the City, beneath the surface of the same, as said streets,
27 avenues, public easements, rights-of-ways, alleys, highways, sidewalks, and bridges of
28 the City, now or may hereafter exist, and lawful purpose as herein mentioned. Nothing in
29 this Franchise shall grant the Company the right to use or operate a gas distribution
30 system owned by the City, absent a separate license agreement supported by independent
31 consideration.

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33 2.2. The Company shall be allowed to operate and maintain all lines existing on the
34 effective date of this Franchise within City Parks, or then existing on land hereinafter
35 designated or used as a City Park, but shall not undertake a major replacement of such
36 lines or lay new lines within said City Park. In the event that the Company has no
37 feasible and prudent alternative to laying a new line or replacing a line which avoids a
38 City Park, and the cost associated therewith exceeds the cost of laying said line in whole
39 or in part within a City Park by 15% or more, then the Company may directly petition the
40 City Council for permission to cross City Park lands. The petition must include the
41 Company's grounds for its assertion that there is no prudent or reasonable alternative to
42 replacing or laying a line in a City Park. Within ninety (90) days of the filing of said

petition, the City Council shall, in accordance with applicable law, including without limitation, Texas Parks and Wildlife Code Chapter 26, either permit the Company to use City Park land, or authorize the Company to, immediately upon completion of such project, adjust its rates for gas service to permit recovery of such total excess costs plus applicable financing charges at the then current prime rate over a period of three (3) years, by surcharge.

2.3. The construction, maintenance, and operation of the Company's Distribution System and property of the Company subject to this Franchise shall be subject to ordinances and regulations passed or approved by the City Council, to the extent that such ordinances and regulations are not in conflict with the laws of the United States, the State of Texas, or the orders, rules or regulations of the Railroad Commission of Texas or other regulatory authority where such authorities have pre-emptive jurisdiction over the subject matter of such City ordinances or regulations.

2.4. The initial term of this Franchise shall expire ten (10) years from the effective date of this Franchise Ordinance, and shall include any period between November 17, 2006 and the effective date of this Franchise Ordinance. The Company agrees to provide, no less than one (1) year before the expiration of the initial term, written notice of its intent to renew this Franchise for the second ten (10) year term. At the end of the initial ten (10) year term, the term shall be automatically renewed for one additional ten (10) year term, unless:

- (a) the Company is in material default under the terms of this Franchise Ordinance and written notice is given to the Company by the City; or
- (b) written notice of intent to terminate this Franchise at the expiration of the initial term is given to the City by the Company; or
- (c) written notice of intent to renegotiate this Franchise at the expiration of the initial term is given to the Company by the City.

2.4.1. Written notices by the City or the Company specified in Section 2.4, above, must be provided one (1) year before the expiration of the initial term. The notice shall specify either the desire to renegotiate or the desire to terminate this Franchise, in which event this Franchise shall either be renegotiated or terminated at the end of the initial term. After renegotiation, this Franchise may be extended for an additional ten (10) year term, which will include ten (10) years from the date of the expiration of the initial term. The party that has been provided notice of its intent to seek to renegotiate the terms of this Franchise may withdraw its request prior to the expiration of the initial term of the Franchise, in which event the Franchise shall be renewed automatically.

1 2.5. (A)(1) The Company shall not transfer this Franchise as part of a sale of
2 stock or assets involving the Company and some or all of its divisions and subsidiaries
3 without the written approval of the Council expressed by ordinance, and such approval
4 shall not be unreasonably withheld.
5

6 (2) The Council may revoke this Franchise if the Company sells,
7 transfers, conveys or otherwise disposes of its rights or interests under this Franchise, or
8 attempts to do so, without the Council's prior written consent. All rights and interests of
9 the Company shall cease if this Franchise is revoked.
10

11 (3) A transfer in violation of this section is void.
12

13 (4) The Company may not assign this Franchise to evade fee payment.
14

15 (B) Nothing in this Franchise may be construed to grant, renew, extend or
16 amend by estoppel or indirection any right, franchise or easement affecting the public
17 streets, highways, sidewalks, alleys, parks, public squares, public places or other real
18 property. Only the City Council shall have the power by ordinance to grant, renew, and
19 extend a franchise to all service providers placing or installing facilities or equipment in,
20 on or over the City rights of way and of all public utilities of every character operating
21 within the city, and with the consent of the franchise holder. The Company may not
22 purport to authorize the transfer of this Franchise by virtue of a sale of its Austin
23 Distribution System. In consideration of the foregoing, and the authority of the City to
24 impose reasonable regulations to insure safe, efficient and continuous service to the
25 public, the City and the Company have established the following procedures regarding
26 sale of the Distribution System and transfer of the franchise.
27

28 (1) In the event the Company expresses its intent by letter or contract to
29 sell its Distribution System located within the City of Austin, separate and apart from
30 other assets of the Company, then the City may, within sixty (60) days of receiving such
31 notice, provide notice to the Company of its intent to exercise its option to commence
32 purchasing the Company's Austin Distribution System in the manner provided in Section
33 18 of this Franchise. When the City has completed its purchase of the Company's Austin
34 Distribution System, the Company shall be released from its obligations or liabilities
35 under this Franchise.
36

37 (2) If the City does not elect to exercise its option to commence
38 purchasing the Company's Austin Distribution System under Section 18 of this
39 Franchise, then the City shall commence an investigation to determine if a franchise
40 should be extended to the entity to whom the Company intends to sell the Austin
41 Distribution System. The City's investigation of the proposed service provider must take
42 place within thirty (30) days from the date of receipt of notice from the Company. The

1 Company shall provide the City with any public information about the transferee of its
2 Distribution System that is within its possession, and that it may legally provide, within
3 seven (7) consecutive days of a written request from the City. Following completion of
4 the investigation and the City's determination of its desire to extend the franchise to
5 proposed service provider, the extension of the franchise by ordinance, under the same
6 terms and conditions as this Franchise, must take place within a time period consistent
7 with the requirements of the City Charter.
8

9 (3) The approval of the City of any transfer or extension of the franchise
10 to a purchaser of the Austin Distribution System shall not be unreasonably withheld. In
11 the event the City determines that it will not extend the franchise to the proposed service
12 provider, then the City must set forth its reasons for not extending the franchise to the
13 proposed buyer of the Austin Distribution System, and the Company shall not be released
14 from its obligations or liabilities under this Franchise.
15

16 2.6. The separation of the utility and non-utility properties of the Company into
17 separate business organizations shall not operate to trigger the requirements of this
18 section.
19

20 **SECTION 3.** Acceptance by Company and Effective Date.

21
22 3.1. This Franchise shall be accepted by the Company in writing, which
23 acceptance shall be filed with the City within sixty (60) days after the passage of this
24 Ordinance by the City Council, and when so accepted this Ordinance shall be a contract
25 duly executed by and between the City and the Company.
26

27 3.2. The City, by the granting of this Franchise, does not surrender or to any extent
28 lose, waive, imperil or lessen the lawful powers and rights now or hereinafter vested in
29 the City under the Constitution and Statutes of the State of Texas and under the Charter
30 of the City to regulate the rates for services of the Company; and the Company, by its
31 acceptance of this Franchise, agrees that all such lawful regulatory power and rights as
32 the same may from time to time be vested in the City shall be in full force and effect and
33 subject to the exercise thereof by the City at any time and from time to time.
34

35 **SECTION 4.** Service.

36
37 4.1. Service shall be provided by means of the use of streets, alleys, Public
38 Easements, and other public rights-of-way. If additional Public Easements are necessary,
39 they shall be the responsibility of the property owner requesting such service. All future
40 locations shall be in a space designated by the City. The Company shall not place its
41 facilities where the same will interfere with any existing cable television, electric, water,
42 street lights, fire lanes or communications lines, or obstruct or hinder in any manner the

1 various utilities serving the residents of the City.
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5 4.2. The Company shall, as specified in its "Rules of Service," as are now, or as
6 shall in the future be approved by the City Council, or other regulatory authority having
7 jurisdiction, furnish service without unreasonable discrimination to all areas of the City.
8 The Company shall not deny service, or otherwise discriminate against applicants for
9 service, customers or consumers on the basis of race, religion, national origin, sex or
10 sexual orientation. The Company, and its successors and assigns, shall have the right to
11 adopt and enforce Rules of Service hereunder not inconsistent with the law of this
12 Franchise Ordinance.
13

14 4.3. The City may require the Company to maintain a Termination of Service
15 Policy in its Rules of Service that is identical to or consistent with that applied to
16 similarly situated City utility customers. The City shall, commensurate with approval of
17 any such change in the Company's Rules of Service, provide for the recovery of the
18 prospective cost impact associated with the change or changes.
19

20 4.4. The Company shall maintain its property and equipment in good order and
21 condition consistent with the needs of the service to be rendered therefrom, but may not
22 be compelled to extend its facilities beyond the consumer's property line. It is
23 recognized that the Company shall retain full title in and right to its personal property
24 whether or not same is incorporated in real estate. The Company shall, at its own cost
25 and without expense, to any of its customers or prospective customers wherever
26 permanent improvements are located on the premises of such current or prospective
27 customer and/or consumer, construct and maintain a service line of proper size and
28 capacity from its main to the property line of each current or prospective customer and/or
29 consumer. The Company shall in every instance install all necessary lines moving
30 unmetered gas.
31

32 4.5. The Company's system and appurtenances shall be located, installed and
33 maintained so that, to the extent reasonably practicable, the facilities do not unreasonably
34 interfere with any improvements the City may deem proper to make, or unnecessarily
35 obstruct the free use of the streets, alleys, bridges, Public Easements or public property.
36

37 4.6. The City Council may, in its discretion, pursuant to the authority of the City
38 Charter, require a management audit of the Company's operations in the City. The costs
39 of such audit shall be borne by the Company but recoverable through its rates.
40

41 4.7. The Company shall actively support the conservation of natural gas by
42 designing, implementing, monitoring, and evaluating such conservation programs. The

1 extent of the Company's specific participation in the conservation of natural gas shall be
2 determined by Ordinances that the Council may adopt, from time to time, during the term
3 of this Franchise. The Company shall work with the City to coordinate conservation
4 programs in a manner which will avoid unnecessary duplication and will enhance
5 benefits to the community. In working with the City, the Company shall attend meetings
6 of the Resource Management Commission, at least once every calendar quarter, for
7 consideration of the Natural Gas Conservation Program.

8
9 **SECTION 5. Use of Streets and Public Easements.**

10
11 5.1. The Company is hereby authorized, licensed and empowered to do any and all
12 things necessary and proper to be done and performed in executing the powers and
13 utilizing the privileges herein mentioned and granted by this Franchise, provided the
14 same do not conflict with existing water pipes, sewers, electric power lines, telephone
15 lines, cable television lines and other authorized installations, and provided that all work
16 done in said streets, avenues, Public Easements, Rights-of-Way, alleys, highways,
17 sidewalks, and bridges by the Company shall be done with the utmost diligence and
18 without unnecessary inconvenience to the public or individuals. Further, the Company's
19 use of the foregoing shall be in accordance with all City Ordinances and the "Standard
20 Specifications for Cuts in Public Rights-of-Way."

21
22 5.2. The mainlines of the Company shall be laid in alleys, streets, and avenues,
23 and other Public Easements, and when in streets and avenues, shall be laid parallel with
24 the curb line thereof, or in such locations as shall be most practical. The Company's main
25 lines shall be installed or replaced at depths which comply with all applicable state and
26 federal rules and regulations establishing minimum safety standards for the design,
27 construction, maintenance and operation of pipelines, provided, however, that in no case
28 shall any main be laid less than 18 inches below the established street grade, without
29 permission of the Director of Public Works.

30
31 5.3. When the Company shall desire to lay any mains hereunder, and before
32 commencing its construction work, it shall submit to the Director of Public Works or
33 other proper authority an application for permit, and a map or plan showing the streets,
34 avenues, alleys, and other Public Easements wherein it proposes to construct its facilities.
35 The Director of Public Works or other proper authority, shall respond in writing to the
36 Company within ten (10) calendar days of the Company's submission either approving or
37 rejecting the plan and if a rejection, listing the reasons for such rejection. Actual
38 approval by the Director of Public Works or other proper authority shall constitute a
39 permit to the Company for the opening of all of the streets, avenues, alleys and other
40 public places shown on the map or plan, and for the construction or laying of the
41 mainlines and other facilities or equipment by the Company. Provided, however, that it
42 shall not be necessary for the Company to secure a permit for the laying of service lines

1 from the mainline pipes of the Company to its customers and/or consumers. Nor shall the
2 Company be required to secure a permit in advance of excavation in the event of an
3 emergency, as defined herein, provided that the Company shall file with the Director of
4 Public Works no later than ten (10) days after the last day of such an emergency, the
5 information that the Company would have been required to pre-file had there not been an
6 emergency and detailed information that describes the circumstances of said emergency.
7

8 5.4. In furtherance of the public interest in safety, health and public welfare and to
9 facilitate the safe management of public right of way, the construction, expansion,
10 reconstruction, excavation, use, maintenance and operation of the Company's
11 Distribution System and property is subject to all generally applicable City requirements.
12 In addition to any other City requirements, the Company shall provide the City's Office
13 of Right of Way Management, or such other officials as the City may designate
14 construction plans and maps showing the routing of any new construction and
15 construction plans, forty- five (45) days prior to the commencement of construction
16 which involves an alteration to the surface or beneath the surface of the public right-of-
17 way, to the extent generally required. The Company shall not begin construction until the
18 plans and drawings have been approved in writing by the Office of Right of Way
19 Management; this approval shall not be unreasonably delayed. The Company shall
20 participate in the Austin Utility Location Coordination Committee ("AULCC") meetings
21 and coordinate new construction with the AULCC. The Company's facilities shall bear
22 the identification marks established by the AULCC if the facilities are installed after the
23 AULCC establishes identification marks.
24

25 5.5. In the event of a conflict between the provisions of this Section 5 and those of
26 City Code Chapter 14-11 or other ordinance of general applicability that regulates the use
27 of City public rights-of-way, the provisions of the City Code shall govern
28

29 **SECTION 6.** **Work by the City and Others.**

30
31 6.1. City reserves the right to lay, and permit to be laid, sewer, cable television,
32 water, telephone and other pipelines, cables and conduits, and to perform and permit to
33 be performed any underground or overhead work that may be necessary or proper in,
34 across, along, over, or under any street, alley, highway, Public Easement, or public place
35 occupied by the Company. The City shall be liable to the Company only for any damage
36 to the facilities of the Company, the producing cause of which is the negligence of the
37 City or its employees.
38

39 6.2 If the City requires the Company to adapt or conform its Distribution System,
40 or in any way alter, relocate or change its property to enable any person, firm, corporation
41 or entity (whether public or private), other than the City, to use the public ways, the
42 Company shall be entitled to reimbursement from the person, firm, corporation or entity

desiring or occasioning such change for any and all loss, cost or expense occasioned thereby.

SECTION 7. Changes for Governmental Purposes.

7.1. If, during the period of this Franchise, the City shall elect to alter or change the grade or alignment of any street, alley or other Public Easement, or any water pipe, wastewater pipe, or any overhead or underground structure within the corporate limits or the extraterritorial jurisdiction of the City, so as to conflict with the facilities of the Company, the Company shall remove or relocate, as necessary, all of its facilities at its own expense. Schedules for this work shall be developed by designated representatives of the Company and the City. If such representatives cannot agree on the schedule, the City Manager, after consultation with the Company, shall establish a schedule. This schedule shall provide for a minimum of thirty (30) days to exist between the time the schedule is furnished to the Company and the time that any specific work to be done by the Company covered in the schedule is to begin.

7.2. Whenever any such project is funded, in whole or in part, with federal or state highway monies, if the federal or state government provides compensation for utility adjustments, the City shall request that compensation be provided to the Company by the funding authority. If the City receives such requested utility adjustment compensation, it shall deliver same to the Company.

7.3. The City shall allow in any rate-setting proceeding, or shall support in any appellate proceeding, as a reasonable and necessary cost, amounts equal to all of the capital facilities in the city, county and state capital improvement projects generally affecting the City incurred or budgeted by the Company from the end of the test period through the twelve (12) months after new rates are expected to be set, as known and measurable changes to the Company's rate base and cost of service. The Company's reserve for depreciation shall be adjusted by an amount equal to deprecation on such increment of capital costs for one-half of the known and measurable change period. The Company in the alternative and at its sole option may choose to accept an addition to the Company's rate base equal to two percent (2%) of the cumulative city, county, and state capital improvement budgets affecting the Austin area. Either option shall be accepted, adopted and otherwise supported by the City as meeting the Company's burden of proof in support of such known and measurable changes.

SECTION 8. Company Rules and Regulations, Jurisdiction.

8.1. The Company and its successors and assigns shall have the right to adopt and enforce Rules of Service for service hereunder not inconsistent with the law or this

Franchise, and shall be subject to the original jurisdiction of the City or other regulatory authorities having jurisdiction from time to time.

8.2. This Franchise shall be governed in accordance with and construed by the laws of the State of Texas. If there is a dispute between the City and the Company on any issue arising under this Franchise Ordinance or the operation of the Franchise created thereunder, other than where an appeal is subject to the Texas Gas Utility Regulatory Act or subsequent regulatory authority, as it may be amended from time to time, the parties agree that trial of such action shall be vested exclusively in the Travis County State District Courts or in the United States District Court for the Western District of Texas.

SECTION 9. Curtailments.

9.1. The Company agrees to actively seek to provide the best mix of gas supply at the lowest prices consistent with its duty to provide safe and reliable services to its customers. The Company shall make an annual report to the City of its gas supply activities relating to Austin, and in addition shall provide such a report upon the circumstances in which it is required to undergo a management audit as set out in this Franchise.

9.2. The Company shall exercise its best efforts under reasonable terms and conditions, to maintain an adequate supply of natural gas to meet the requirements of residential consumers, hospitals and essential governmental services within the municipal limits of the City of Austin.

9.3. The Company's undertakings shall be subject to its ability, by use of due diligence and normal business methods, to obtain and place in service the necessary materials and facilities. Moreover, the Company shall be excused from failure or delay in performing such obligations if and to the extent occasioned by an act of God, fire, explosion, flood, act of a public enemy, contagion or contamination hazardous to human life or health, legal restraints, labor difficulties, material shortages, interruption or deficiency of gas supply not attributable to default of the Company or, without limitations, any other cause or combination of causes not reasonably within the Company's ability to anticipate or control. The Company shall notify the City promptly and in no case less than thirty (30) days of its intent to utilize this provision of this Franchise. In any case of shortage of gas supply due to any cause where the Company, by reason thereof, is unable to furnish gas for all purposes, preference shall be as specified in the curtailment procedure set forth in its Rules of Service.

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5 **SECTION 10. Annexations by City.**
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7 The City shall notify the Company in writing of the annexation of any new
8 territory into the city limits of the City. Upon receipt of notice of annexation from the
9 City, the Company shall have sixty (60) days to begin collecting and paying the
10 Franchise Fee for any revenues received from the Company's customers and/or
11 consumers residing in the newly annexed territories.
12

13 **SECTION 11. Fees, Rates.**
14

15 11.1. Since the streets, rights-of-way, and Public Easements to be used by the
16 Company in the operation of its system within the boundaries of the City are valuable
17 public properties acquired and maintained by the City at great expense to its taxpayers,
18 and since the grant to the Company of the use of said streets, rights-of-way, and Public
19 Easements is a valuable property right without which the Company would be required to
20 invest substantial capital in right-of-way costs and acquisitions, and since the City will
21 incur costs in regulating and administering the Franchise, the Company shall, throughout
22 the term of this Franchise, pay the City the aggregate sum of five percent (5%) of the
23 Company's total gross revenues (exclusive of the Texas Limited Sales Tax), collected for
24 gas utility and transportation services to consumers and customers within the corporate
25 limits of the City under the Company's rates, effective from time to time, excepting
26 therefrom, however, the gross revenues from gas sold to the City for its own use, and the
27 value of gas transported by the Company for Transport customers before January 1, 2010.
28

29 11.1.1 The Company shall pay the City the aggregate sum of 2.5% of the
30 total value of natural gas that the Company transported for transport customers, other
31 than public entities, as herein defined, between January 1, 2008 and December 31, 2009.
32 Thereafter, the Company shall pay the City the aggregate sum of 5% of the total value of
33 said transported gas for the remainder of the term of the Franchise.
34

35 11.2. The Franchise Fee shall be paid quarterly to the City on or before the 15th
36 day of the second month following the end of the quarterly period for which said
37 payment is due. The Franchise Fee payment shall be made via electronic funds transfer.
38 At the time said payment is made, the Company shall deliver to the City's Office of
39 Telecommunications and Regulatory Affairs or successor in function, a summary
40 statement indicating the derivation and calculation of such electronic funds transfer
41 payment. For purposes of determining such fee, the books of the Company shall at all
42 reasonable times be subject to inspection by the duly authorized representatives of the

1 City, subject to the City providing twenty (20) days written notice to the Company of its
2 intent to conduct such inspection. The inspection and audit shall be limited to the three
3 (3) years immediately preceding the date of the written notice. The expense of all audits
4 and reviews of all Company records for the purpose of the operation of this Franchise
5 shall be paid by the Company and recovered in tariff on file for this Franchise.
6

7 11.2.1 In the event any quarterly payment is made after 5:00 p.m. on the date
8 due, the Company shall pay to the City a late payment charge of the greater of:
9

10 (a) \$100, or

11
12 (b) Simple interest at 10% annual percentage rate of the total amount
13 past due.
14

15 11.3. The Franchise Fee shall be in lieu of any and all other rentals or
16 compensation or Franchise, license, privilege, instrument, occupation, excise or revenue
17 taxes or fees and all other exactions or charges (except ad valorem property taxes, special
18 assessments for local improvements, and such other charges imposed uniformly upon
19 persons, firms or corporations then engaged in business with the City), or permits upon or
20 relating to the business, revenue, Franchise, gas lines, installations and systems, conduits,
21 storage tanks, pipes, fixtures and other facilities of the Company and all other property of
22 the Company and its activities, or any part thereof, in the City which relate to the
23 operations of the Company's gas distribution system.
24

25 11.4. Said Franchise Fees shall accrue to the City only so long as the City, after
26 notice and the opportunity to cure in the instance of disagreement between the parties,
27 does not charge, levy, require or collect any other rentals or compensation of franchise,
28 license, privilege, instrument, occupation, inspection, excise or revenue taxes, fees or
29 other exactions or charges relating to the operation of the Company's gas Distribution
30 System in the City as aforesaid.
31

32 11.5 The Franchise Fees defined in the Franchise Ordinance are a reasonable and
33 necessary operating expense of Company and may be fully recovered by Company by
34 collection from its customers in the City, whether asserted retroactively or prospectively,
35 by revising its rate schedules, assessing an additional charge to the monthly bills of its
36 customers within the City, adding an additional charge to the Company's purchased gas
37 adjustment clause for the City or in any legal manner approved by the City.
38

39 11.6. Company shall be allowed to fund, in the rate base, a reserve account to
40 provide for an orderly accumulation of funds necessary for payment of the Franchise
41 Fees specified in Sections 11.1 and 11.1.1.
42

1 11.7. (A) Each transportation customer of the Company shall disclose to the
2 Company the purchase price of said gas. Should the transportation customer fail or
3 refuse to disclose or furnish such purchase price to Company, Company shall establish
4 same by utilizing 110% of the Houston Ship Channel Index of prices for large packages
5 of gas published each month in Inside FERC's Gas Market Report (or a successor
6 publication or another publication agreed upon by the City and Company) for the period
7 of time the transportation service is performed.
8

9 (B) The Company shall use all due diligence in collecting from customers
10 any and all fees required by this Franchise agreement, but shall not be responsible for
11 paying same to City if the Company's customer refuses to pay the fee imposed on the
12 purchase price of the gas transported, and remains delinquent in payment of such fee for a
13 period greater than thirty days. The Company shall be responsible for the uncollected fee
14 on any gas thereafter transported through the rights of way of the City to the Company's
15 transportation customer, but in no event shall the customer be relieved.
16

17 11.8. (A) The City Council hereby expressly reserves the right, power, and
18 authority to fully regulate and fix the rates and charges for the services of the Company to
19 its consumers as provided by State law and the City Charter.
20

21 (B) The Company may from time to time propose changes in its general
22 rates by filing an application with the City Secretary for the consideration of the City
23 Council. Within a reasonable time consistent with law, the City Council shall afford the
24 Company a fair hearing with reference to the application and shall either approve or
25 disapprove the proposed changes or make such order as may be reasonable.
26

27 (C) In order to ascertain any and all facts, the City Council or its designate
28 shall have full power and authority to inspect, or cause to be inspected, the books of the
29 Company, and to inventory and appraise, or cause to be inventoried, and appraised, the
30 property of the Company, and to compel the attendance of witnesses and the production
31 of books and records.
32

33 (D) The City shall not allow as to rates or services an unreasonable
34 preference or advantage to anyone within a service classification, nor allow the Company
35 to subject anyone within a service classification to any unreasonable prejudice or
36 discrimination. Neither shall the Company grant, directly or indirectly, any rebate, in the
37 form of money or any other thing of value, to any consumer in order to circumvent the
38 rate schedules filed with the City pursuant to this Franchise Ordinance.
39

40 (E) The City Council has authority to require the Company to allocate costs
41 of facilities, revenues, expenses, taxes, and reserves between the City and other
42 municipalities or unincorporated areas, consistent with State Law.

1
2 11.9. The Company agrees that the City may, at any time during the term of this
3 Agreement, at the expense of the Company, obtain expert assistance and advice in
4 determining fair, just, and reasonable rates to be charged by the Company to its
5 consumers in the corporate limits of the City, and in determining the extent to which the
6 Company is complying with the terms and conditions of this Ordinance. The Company
7 agrees to pay reasonable expenses in connection therewith, or reimburse the City for the
8 same, which expense the Company shall be entitled to recover through rates and tariffs.
9

10 11.10. The Company shall file annually with the City's Chief Financial Officer, or
11 his designate, no later than four (4) months after the end of the Company's fiscal year,
12 annual audited statements of the Company. The certified public accountant preparing the
13 statement shall certify that the statement is in accordance with applicable generally
14 accepted accounting principles.
15

16 **SECTION 12. Indemnity.**
17

18 The Company shall indemnify, defend, and save harmless the City, its agents,
19 officers and employees, against and from any and all claims by or on behalf of any
20 person, firm, corporation, or other entity, arising from the Company's construction,
21 operation or management of its transmission or Distribution System, or arising from any
22 act of negligence of the Company, or any of its agents, contractors, servants, employees,
23 or licenses, including a breach of the Company's obligation under this Franchise
24 Agreement to provide the City information contained in written reports that is free of
25 material misrepresentation, and from and against all costs, counsel fees, expenses and
26 liabilities incurred in or about any such claim or proceeding brought thereon; except that
27 the indemnity provided for in this paragraph shall not apply to any liability resulting from
28 the negligence or intentional acts or omissions of the City, its officers and employees. In
29 the event a claim allegedly arises from the concurrent fault of both the City and the
30 Company, the Company must indemnify the City to the full proportionate extent to which
31 the Company is found to be responsible. The City shall promptly notify the Company of
32 any claim or cause of action which may be asserted against the City relating to or
33 covering any matter against which the Company has agreed, as set forth above, to
34 indemnify, defend and save harmless the City. The Company reserves the right, but not
35 the obligation, to employ such attorneys, expert witnesses and consultants as it deems
36 necessary to defend against the claim or cause of action. The Company shall have the
37 right to investigate, defend and compromise all claims referred to herein after conferring
38 with the City's Law Department. It is understood that it is not the intention of either the
39 City or the Company to create any liability, right or claim for the benefit of third parties
40 and this franchise ordinance is intended and shall be construed for the sole benefit of the
41 City and the Company.
42

1
2
3
4
5 **SECTION 13.** **Insurance.**
6

7 The Company will maintain a level of insurance in consideration of the Company's
8 obligations and risks undertaken pursuant to this Franchise that is consistent with best
9 industry practices. Such insurance may be in the form of self-insurance to the extent
10 permitted by applicable law, under an approved formal plan of self-insurance maintained
11 by the Company in accordance with sound accounting and risk-management practices. A
12 current certificate shall be provided to the City. The Company shall be responsible for
13 paying all self-insurance retention and insurance deductibles associated with the payment
14 of any claim arising from activities conducted under this Franchise.
15

16 **SECTION 14.** **Equal Employment Opportunity.**
17

18 14.1. The Company shall adhere to equal employment practices within the City of
19 Austin, and to all federal, state and local rules and laws pertaining to discrimination,
20 equal employment and affirmative action.
21

22 14.2. The Company shall provide equal employment opportunity to minorities,
23 women and the physically disabled at all levels and in all phases of operation. In
24 addition, the Company shall promulgate an affirmative action policy which shall cover, in
25 addition to employment: training, the granting of internships, purchasing, and the
26 employment of subcontractors.
27

28 14.3. Company shall make all reasonable efforts to comply with its affirmative
29 action commitments.
30

31 **SECTION 15.** **Forfeiture and Termination.**
32

33 15.1. In addition to all other rights and powers retained by the City under this
34 Franchise or otherwise, the City reserves the right to declare this Franchise forfeited and
35 to terminate the Franchise and all rights and privileges of the Company hereunder in the
36 event of a material breach of its terms and conditions. A material breach by the
37 Company shall include, but shall not be limited to, the following:
38

39 (A) Failure on more than three (3) occasions to pay when due the Franchise
40 Fee prescribed by Section 11 hereof. Failure to pay a single installment of the Franchise
41 Fee in full (including late payment charges in accordance with §11.2.1) within thirty
42 (30) days after the due date, in the absence of a bona fide dispute communicated to the

1 City in writing on or before the due date of the applicable Franchise Fee installment, is a
2 material breach.

3
4
5 (B) Failure to materially provide the services provided for in this Franchise
6 Ordinance;

7
8 (C) Material misrepresentation of fact in the application for or negotiation of
9 the Franchise; and

10
11 (D) Conviction of any director, officer, employee or agent of the Company
12 of the offense of bribery or fraud connected with or resulting from the awarding of this
13 Franchise to the Company.

14
15 15.2. The foregoing shall not constitute a material breach if the violation occurs
16 without fault of the Company or of its employees or occurs as a result of circumstances
17 beyond its control. Company shall not be excused by mere economic hardship or by
18 malfeasance or the malfeasance of its directors, officers, or employees.

19
20 15.3. In order for the City to declare forfeiture, the City shall make a written
21 demand that the Company comply with any such provision, rule, order, or determination
22 under or pursuant to this Franchise. If the violation by the Company continues for a
23 period of forty-five (45) days following such written demand without written proof that
24 the corrective action has been taken or is being actively and expeditiously pursued to
25 completion, the Council may take under consideration the issue of termination of the
26 Franchise. The City shall cause to be served upon the Company, at least twenty (20) days
27 prior to the date of such a Council meeting, a written notice of intent to request such
28 termination and the time and place of the meeting. Public notice shall be given of the
29 meeting and issue which the Council is to consider.

30
31 15.4. The Council shall hear and consider the issue, shall hear any person
32 interested therein, and shall determine, in its discretion, whether or not any violation by
33 the Company has occurred.

34
35 15.5. If the Council shall determine that the violation by the Company was the
36 fault of the Company and within its control, the Council may declare the Franchise of the
37 Company forfeited and terminated, or the Council may grant to Company a period of
38 time for compliance. Nothing herein shall be deemed a waiver of the Company's right to
39 pursue all available legal remedies.

40
41 **SECTION 16. Change of Control.**

1 Upon the foreclosure or other judicial sale of all or a substantial part of the
2 Distribution System within the corporate limits of the City, or upon the leasing of all or a
3 substantial part of the Distribution System, the Company shall notify the City of such
4 fact, and such notification shall be treated as a notification that a change in control of the
5 Company has taken place and the provisions of this Franchise governing the consent of
6 the Council to such changes in control of the Company shall apply.
7

8 **SECTION 17. Receivership and Bankruptcy.**

10 17.1. The Council shall have the right to cancel this Franchise one hundred twenty
11 (120) days after the appointment of a receiver or trustee to take over and conduct the
12 business of the Company, whether in receivership, reorganization, bankruptcy or other
13 action in proceeding, whether voluntary or involuntary, unless such receivership or
14 trusteeship shall have been vacated prior to the expiration of said one hundred twenty
15 (120) days, or unless;
16

17 17.2. Within one hundred twenty (120) days after his or her election or
18 appointment, such receiver or trustee shall have fully complied with all the provisions of
19 this Franchise and remedied all defaults thereunder; or
20

21 17.3. Such receiver or trustee, within one hundred twenty (120) days, shall have
22 executed an Agreement, duly approved by the court having jurisdiction, whereby the
23 receiver or trustee assumes and agrees to be bound by each and every provision of this
24 Franchise granted to the Company.
25

26 **SECTION 18. Purchase.**

27
28 18.1. If the Franchise is renewed pursuant to the terms of section 2.4 of this
29 Agreement, the City shall have the option to purchase the Company's Distribution
30 System within the City of Austin at any time after the end of the fifth year second, ten
31 year term.
32

33 18.2. The following are conditions precedent to the exercise of City's option to
34 purchase:
35

36 18.2.1. The City must provide the Company with written notice of the City's
37 intention to exercise its option to purchase the Company's property devoted to the
38 Distribution System.
39

40 18.2.2. Within thirty (30) days after receipt of the notice of intention to
41 exercise its option, the Company shall make a written offer ("Offer") stating the cash
42 price at which the Company is willing to close the purchase and sale of the Distribution

1 System., Within ninety (90) days of the receipt of the Offer, the City must give written
2 notice to the Company (a) that the Offer is rejected and the appraisal procedures set forth
3 in Section 18.3 are to be initiated, (b) that the City agrees to purchase the Distribution
4 System for cash at the cash price stated in the Offer, or (c) withdraw its notice of intent to
5 exercise its purchase option.
6

7 18.2.3. If the City agrees to purchase the Distribution System at the price
8 stated in Company's Offer, the parties shall negotiate the terms of a definitive purchase
9 agreement in good faith. Closing shall take place within thirty days after satisfaction of
10 all conditions precedent to the sale in the purchase agreement are satisfied, or at such
11 other time upon which the parties may mutually agree.
12

13 18.3. Upon initiation of the appraisal procedures set forth in this section, the
14 Company and the City shall each appoint an appraiser within thirty (30) days after
15 delivery of the written election for appraisal under Section 18.2. The appraisers shall be
16 experienced in the evaluation of gas distribution systems, and neither appraiser shall have
17 worked for either the City or the Company within five (5) years of the date of
18 appointment or be otherwise disqualified from rendering independent judgment. The
19 City and the Company shall each immediately provide the name, mailing address and
20 telephone number of its appointee to the other party. The appointed appraisers shall
21 agree on the appointment of a third appraiser with like qualifications.
22

23 18.3.1 Within thirty (30) days after appointment of the third appraiser and
24 after no less than least fifteen (15) days written notice to the parties, the appraisers shall
25 commence their determination of the appraisal value of the Distribution System.
26

27 18.3.2. Within ninety (90) days after the commencement of the appraisal
28 process, the appraisers shall each file with the City and the Company a written proposed
29 decision on the appraised value, including detailed written findings explaining the basis
30 of the proposed valuation. The factors for the appraisers to consider in arriving at a fair
31 market value for the Company's facilities shall include, but not be limited to, the
32 following:
33

- 34 (A) the book value of the assets constituting the Company's Distribution
35 System ithin the City of Austin;
- 36
- 37 (B) the age and condition of the physical plant and equipment;
- 38
- 39 (C) the discounted future revenue stream generated from the customer
40 base; and
- 41
- 42 (D) the remaining useful life of the Company's distribution system within

the City of Austin.

18.4. Closing shall be held at a mutually agreeable location one hundred twenty (120) days after the City's receipt of the Offer ninety (90) days after the final decision of the appraisers becomes final. At the closing, the City shall pay in the case the cash price stated in the Offer or the final appraisal value, as appropriate.

18.5. The time periods specified in this section may be modified or extended only by a writing duly authorized and executed by both the City and the Company. Such authorization shall not be unreasonably withheld, provided that any such request shall be made in writing and received by the other party within a reasonable time prior to the expiration of the time period sought to be extended.

18.6. In the event the City decides not to purchase the Company's Distribution System or the City is financially unable to close the purchase of the Company's Distribution System within the time set forth herein, the City's purchase right shall be deemed waived and the City shall reimburse the Company for all the Company's costs and expenses expended in preparing for the purchase transaction.

SECTION 19. Severability.

19.1. If any word, phrase or one or more provisions of this Franchise are held to be void, voidable, or unenforceable by a court of competent jurisdiction in a final judicial action, the word(s), phrase(s), or provision(s) are severed from the remaining provisions of the Franchise. Such a word, phrase, or provision shall not affect the legality, validity, or constitutionality of the remaining portions of this Franchise. The City and the Company enter into this Franchise and each of its provisions regardless of any provision that is held to be illegal, invalid, or unconstitutional, provided, however, that the City and the Company each reserves the right to terminate the Agreement authorized by this Franchise Ordinance if any provision set out herein is held to be illegal, invalid or unconstitutional.

19.2. Nothing herein contained shall be construed as granting any exclusive Franchise or right.

SECTION 20. Interpretation.

The use of captions or headings for the various sections of this Ordinance are for convenience of parties only and do not reflect the intent of the parties. The rule of interpretation to resolve ambiguities in a contract against the party drafting such contract

shall not apply to this Franchise.

SECTION 21. Dispute Resolution.

21.1. If a dispute arises out of or related to the Franchise, or the breach thereof, the parties agree to negotiate prior to prosecuting a suit for damages. However, this section does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to seek injunctive relief. Either party may make a written request for a meeting between representatives of each party within fourteen (14) calendar days after receipt of the request or such later period as agreed by the parties. Each party shall include, at a minimum, one (1) senior level individual with decision-making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt, in good faith, to negotiate resolution of the dispute. If within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written Agreement signed by both parties, in which event the parties may proceed directly to mediation as described below.

21.2. If the efforts to resolve the dispute through negotiation fail, or the parties waive the negotiation process, the parties may select, within thirty (30) calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option, the City and the Company agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in the Franchise prevents the parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC).

21.3 The parties agree to participate in mediation in good faith for up to thirty (30) calendar days from the date of the first mediation session. The City and the Company will share costs of the mediator selected to mediate the dispute, equally.

PART 2. In compliance with Article XI (*Franchises and Public Utilities*), Section 3 (*Ordinance Granting Franchise*) of the City Charter, the Company shall bear the expense of publishing the full text of this ordinance in a newspaper of general circulation in the City within five days after each of the three readings of this ordinance.

1 **PART 3.** If any of the terms of this ordinance conflict with the City Charter, the terms of
2 the Charter prevail.

3
4 **PART 4.** Ordinance No. 86-0918-T is repealed on the effective date of this ordinance.

5 **PART 5.** This ordinance takes effect on _____, 2006.

6 **PASSED AND APPROVED**

7
8
9
10 _____, 2006

§
§
§

Will Wynn
Mayor

11
12
13
14
15 **APPROVED:** _____

David Allan Smith
City Attorney

ATTEST: _____

Shirley A. Gentry
City Clerk